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As such, it constitutes a substantive violation of law for purposes of Minn. Stat. § 14.50. To correct this defect it is recommended that this subpart be amended to read as follows:

Retirement contributions for each employee must be limited to either a qualified pension plan or a qualified profit sharing plan submitted to, and approved by, the Internal Revenue Service.

Non-qualified plans have not been included in the proposed amendment because such plans do not have to meet the same requirements as qualified plans. Among other things, qualified plans must be structured so that funds cannot be diverted to purposes other than the benefit of employees. Moreover, qualified plans must meet minimum vesting and participation standards, and cannot discriminate in favor of office holders and highly compensated employees.

9553.0035, subp. 12, Preopening Costs.

73. This subpart governs the treatment of costs incurred to open an ICF/MR -- the preopening costs. Preopening costs include only the operating costs incurred by a facility. Property-related costs are treated differently under the rule. Many of the costs associated with opening the facility are incurred just prior to opening. Therefore, the Department determined that "one time" costs incurred within 30 days of opening should be treated as an interim cost and included as an expense of the interim period. This is a sensible approach and it is concluded, therefore, that the provisions of item A are necessary and reasonable as proposed. However, neither the Department's SNR nor the rule define the meaning of the words "one time" preopening costs. This renders the rule impermissibly vague for purposes of Minn. Stat. § 14.02, subd. 4 and constitutes a substantive violation of law for purposes of Minn. Stat. § 14.50 (1984). To correct these defects, the words "one time" must be deleted or the rule must be amended to explain their meaning. This subpart does not contain any criteria that can be used for determining when a facility is opened and its provisions are applicable. Apparently that is intended to be covered by the language in part 9553.0075, subp. 1. If that is not the Department's intent it should further clarify the rule.

9553.0035, subp. 12, item B.

74. This subpart requires that the operating costs incurred more than 30 days prior to opening be amortized. Originally, the Department proposed an amortization period of 120 months, which was twice as long as that provided for in Rule 53T. Based on objections from the industry, the Department now proposes to replace the 120-month standard with the 60-month standard found in the temporary rule. As amended, this part is necessary and reasonable because expensing preopening costs occurring more than 30 days prior to the opening of a facility could distort its operating cost payment rate. Moreover, the amendment made does not constitute a substantial change for purposes of Minn. Rule 1400.1100.

9553.0035, subp. 14, Top Management Compensation.

75. This subpart places limitations on top management compensation. Under item A, the maximum allowable cost of top management compensation is

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calculated on the basis of the number of facilities and licensed beds owned and operated by the same provider or provider group as follows:

- (1) For a single facility, regardless of size, the limitation is the lesser of \$847 per bed or \$40,656;
- (2) For two or more facilities with a total bed complement or 48 beds or less, the limitation is the lesser of \$847 per bed or \$40,656;
- (3) For two or more facilities with a total bed complement of more than 48 beds, the limitation is \$40,656 plus \$348 for every bed in excess of 48, provided that no single facility's compensation may exceed the lesser of \$847 per bed or \$40,656, as provided in (1).

The limitations in item A are based upon the Department's determination of a reasonable salary for a top management employee working 40 hours weekly, presumed economies of scale and incentives to encourage the use of smaller facilities. About the time Rule 52 was promulgated (1973), the Department conducted a survey of top management compensation. Based on that survey, it calculated a top management compensation limitation. The original limitation, updated on the basis of changes in the consumer price index, has been used ever since, and is now at \$40,656. Using \$40,656 as its limitation, the Department then determined the size of facility which would require such an employee. To do that it considered the amount of top management a typical six bed facility would need. It concluded that a minimum reasonable amount of top management for such a facility would be five hours. Extrapolating from that, it concluded that a 48-bed facility would require five hour's time for each six beds, or 40 hours per week. Since the limitation historically used for a full time executive was \$40,656, the Department concluded that the per-bed limitation on top management cost should be \$847 annually (\$40,656 divided by 48). All providers and provider groups get \$847 per bed for their first 48 beds. Although these beds may be located in a different number of facilities, the Department determined that there would be no significant economies of scale for providers having 48 beds or less (i.e., the top management cost per bed would be the same). If a single facility has more than 48 beds, the Department determined that there would be economies of scale so that additional top management services would not be required as additional beds are added. However, if a provider or provider group has more than 48 beds in more than one facility, it determined that additional top management duties would be required but that the per-bed limitation should be reduced because some economies of scale would be available. It chose \$348 as the appropriate per-bed limitation. The manner in which that figure was calculated is unknown.

76. The provisions in this item were the subject of extensive criticism. Both the concepts used, the assumptions made and the specifics of the rule were challenged. Dr. Bjork argued that there is no reliable data showing that a full time executive's salary should be \$40,656 or that a six-bed facility requires five hours of weekly top management time. Dr. Bjork also argued that the rule does not consistently apply economy of scale concepts or recognize the differences between facilities in terms of number, size, location, dispersion or resident base. Assuming that there are economies of scale, he argued that it was absurd to assume that there is no economy of scale below 48 beds and substantial economies of scale above that level. He also criticized the Department's recognition of additional costs incurred by multi-facility

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provider groups having over 48 beds, while failing to recognize the additional costs incurred by single facilities having more than 48 beds. Mark Larson made similar arguments. He noted that REM operates 27 ICF/MRs with 658 beds and would be limited to \$252,436 in top management compensation while the limitation would be \$557,326 if the REM facilities were separately owned and operated. He argued that economies of scale were not shown to justify such a differential. REM has six administrators managing 27 facilities -- an average of 4.5 facilities and 110 residents for each administrator. Assuming that is an efficient management structure, and that each of them is required to work full time and are paid \$40,656, REM's annual top management costs for those six administrators would be \$243,936 leaving it with \$8,500 to cover the top management expenses of other top management personnel. If REM paid these individuals \$53,820 annually, which is a maximum set forth in item B, it would not receive reimbursement for most of the salary payments over the \$40,656 limitation applicable to single facilities of 48 beds, even though they are responsible for more facilities, and on an average, twice as many residents.

Many other commentators questioned the need for limitations on top management compensation given the limitations on administrative costs contained in the rule. Nonetheless, it is concluded that specific limitations on top management compensation are necessary. In implementing the legislative directive to place limitations on administrative costs the Department would have a variety of options available to it. The records shows that many administrative costs are outside a provider's control. Executive salary costs, however, are controllable. Since they are controllable costs, since they are subject to abuse, and since the Legislature was particularly concerned with top management costs when it required that the Department limit administrative costs, it is concluded that limitations are necessary.

77. It is also concluded that the \$40,656 figure is within a reasonable range and could be used to limit the compensation payable to a facility whose management needs can be performed by one individual working on a full time basis. Although that \$40,656 figure is not based on a current survey of salaries paid, such a survey is not required. In establishing the limitation on top management compensation, the actual salaries now paid to such persons, while relevant, are not controlling. The reason for this is that the Department can only recognize costs that must be incurred to manage a facility in an efficient manner. It is not bound to reimburse providers for any salaries that they may set for themselves or that they are currently paying. The Department must determine a salary limit that is reasonable for management services on a full time basis. What is reasonable is not synonymous with what facilities are paying or would be willing to pay absent some limitation. Moreover, the limitation proposed by the Department is based on some survey data. While the survey is not current, the original figures obtained have been routinely adjusted for changes in the consumer price index and the figure proposed is comparable to that currently being paid in the nursing home industry. Since fixing a reasonable level of compensation for such a full time employee is legislative in nature, and in view of the factors mentioned above, it is concluded that the \$40,656 figure is a reasonable maximum for a facility requiring one full time (40 hour) top management person. However the Department failed to establish the need and reasonableness of assigning that limit to a facility or facility group having 48 beds or less. While the Department said "it believes" that a six bed facility requires a minimum of five hours of top management work each day, there is no evidence or

explanation for that belief. As such it is concluded that the 48-bed figure has no rational basis and is arbitrary. Since the \$847 figure depends for its reasonableness upon the 48-bed factor, it too was not shown to be necessary or reasonable. Likewise, the Department offered no explanation or data supporting its conclusion that a single facility containing 100 beds or more does not require more management time than a facility containing 48 beds or less. That conclusion is not based on any evidence or explanation in the record and is not necessary or reasonable.

Finally, the Department failed to establish any rational basis for limiting provider groups operating more than one facility to \$348 per bed for each bed over 48. The \$348 figure was not correlated to any evidence explaining management needs or costs. It is an arbitrary figure and is not necessary and reasonable for purposes of Minn. Stat. § 14.14, subd. 2 (1984). While the Department's rules do not have to be mathematically precise and do not have to afford perfect justice, the limitations imposed must reimburse an efficiently operated facility for costs that must be incurred. In this case there is no basis for believing that the rule would do that and it cannot be adopted.

78. The Department argued that there are economies of scale in single facilities having more than 48 beds so that no additional management costs would be incurred as more beds are added. As Dr. Bjork noted, that conclusion has no rational basis and it has no evidentiary support in the record. The Department responded that the limitation on single facilities above a 48-bed size is reasonable because the Department desires to discourage larger facilities. In its rate setting rules the Department may provide incentives and disincentives for obtaining desirable policy goals. However, a properly licensed facility operated in an efficient manner is entitled to obtain reimbursement for the costs it must incur. That statutory directive cannot be ignored to force those facilities to reduce their size.

The rules do not address the differences in providers or discuss the different management needs resulting from differences in locations, dispersion, and size. Moreover, the rule would permit compensation of \$53,820 for a provider group of two facilities having a total of 96 residents but substantially less than that if four facilities containing 110 residents are managed, as is the case with the REM facilities. Taking REM as an example, there is no evidence that its management costs are less than half of the costs that would be incurred if its 27 facilities were separately operated. Such a result is not even supported by expert testimony regarding the use and reliability of economies of scale concepts. Therefore, for all the reasons stated above, it is concluded that the need and reasonableness of item A has not been established with an affirmative presentation of facts in the record and that it may not be adopted. To correct this defect, item A must be deleted.

9553.0035, subp. 14, item B.

79. Item B restricts the total compensation payable to any top management individual to \$53,820 annually. That figure is based on the midpoint in the salary range of the Department's Assistant Commissioner. Dr. Bjork objected to using the Assistant Commissioner's salary to set a limitation on the maximum allowable salary payable to an individual in the ICF/MR industry. He

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presented a variety of reasons why he felt that comparison was inappropriate. All of his objections were unpersuasive. The midpoint in the Assistant Commissioner's salary range is similar to the maximum salary paid to the chief executive officers of state hospitals, the largest of which has over 700 beds. The record also establishes that there are sufficient similarities between the two positions to justify the comparison used. The comparison to be made, and the limits to be established, depend on legislative facts (policy decisions) that agencies have the authority to make. If they have a rational basis they must be found to be reasonable even if they are not the most reasonable limitations that could be imposed. The limitation proposed by the Department is reasonable and maybe adopted as proposed. It is based on a position of equivalent if not greater responsibilities and is limited by the same legislative considerations. There is no evidence in the record that facilities are unable to hire and retain qualified individuals at those salary levels and the rule is clearly authorized.

9553.0035, subp. 14, G.

80. Under this item the top management compensation per bed limitations in item A and the limitation in item B are to be adjusted by 1% for each full percentage difference between the previous two Januaries prior to the rate year in the All Urban Consumer Price Index (CPI - U) for the Minneapolis-St. Paul area. Dr. Bjork questioned the propriety of using changes in the price of goods and services to determine appropriate changes in compensation levels. He noted that salaries change at different rates than changes in the Consumer Price Index, and that salaries in the health care industry have historically increased at a faster rate than changes in the CPI-U. He suggested, therefore, that the Department measure movement in the labor market rather than movement in the price of gasoline or groceries to set compensation levels for top management employees. However, since there is some correlation between changes in the CPI-U and changes in wages, and since the Department has determined that salaries in the health care field have been rising too fast, using the CPI-U is necessary and reasonable. However, requiring a full percentage change in the CPI-U before changes in that index are reflected in changes in the compensation limitations was not shown to be necessary and reasonable. If the Consumer Price Index is, in fact, an accurate measure of salary changes, recognizing only a 1% change in the compensation limitation when the Consumer Price Index has increased by 1.9% is neither necessary nor reasonable and is in violation of the provisions of Minn. Stat. § 14.14, subd. 2 (1984). To correct this defect, the Department must amend item G to recognize changes in the Consumer Price Index to the nearest .1 of 1%. Of course the language will also have to be amended to accommodate deletion of those parts of item A which cannot be adopted.

9553.0335, subp. 15, General Cost Principles.

81. This subpart contains the general principles governing allowable costs. To be allowable the costs must be ordinary, necessary and related to resident care; be a cost that a prudent and cost conscious business person would pay in the open market in an arms-length transaction; be for goods or services actually provided to the facility and actually paid for within 180 days after the close of the reporting year; not have the effect of circumventing the principles of the rule; and not result from management inefficiency, unnecessary care, agreements not to compete or activities not

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commonly accepted in the industry. Several persons objected to the restriction in item E that a cost cannot be related to activities "not commonly accepted" in the ICF/MR industry. Barbara W. Kaufman, Executive Director of the Minnesota Association of Voluntary Social Service Agencies argued, for example, that the limitation suggests that innovation is unwanted and unnecessary, and that the phrase is meaningless because of the diversity which exists in the industry. Those arguments are not persuasive. The purpose of the provision is not to hamper facilities in designing creative solutions to problems, but to prohibit reimbursement for activities that the industry has determined are inappropriate (not accepted). The rule does not refer to activities not commonly used or engaged in, but activities that are not accepted. The language implies that the activity, rather than being accepted, has been rejected. Therefore, it is concluded that the provision is necessary and reasonable and may be adopted.

NONALLOWABLE COSTS

82. Part 9553.0036 contains a detailed listing of costs that are not allowable for purposes of establishing the payment rate of an ICF/MR. The introduction states that if any of the costs listed are included in any account of the provider or provider group they must be identified on the facility's cost report. The controversial nonallowable costs listed in the rule are discussed below.

9553.0036, item C.

83. Under this item, assessments made or the portion of dues charged by associations or professional organizations for lobbying, political contributions, or litigation, except successful challenges to decisions of Minnesota agencies, are not allowable costs. The rule provides that when a breakdown of the dues charged to a facility by an association or professional organization is not provided after requested by the Commissioner, the entire cost of the dues paid must be disallowed. Mr. Furlong argued that this item should be deleted because a provider has no reasonable means of obtaining or guaranteeing the accuracy or reliability of the third party information required under this rule. Nonetheless, the rule is necessary and reasonable as proposed to insure that the dues paid by facilities are not used for purposes the Department has determined are not sufficiently related to patient care to be reimbursed under the Medical Assistance program. If the professional organizations to which facilities pay dues are not willing to abide by the rule, each facility will have to decide whether it should be retain its membership.

9553.0036, item D.

84. Under this item, advertising costs which are incurred to encourage potential residents to select a particular facility are not allowable. However, facilities may spend up to \$2,000 annually for notices in the telephone yellow pages. Annette Rowland, speaking on behalf of ARRM, questioned whether the \$2,000 limitation in this rule would be adequate five years hence. The same questions were raised about the dollar limitations on pet costs and resident vacations. All these dollar limitations are necessary and reasonable. The Department is not required to adopt limitations which will have the same real-dollar impact from one year to another, anticipate how

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costs will change, or tie the limitation to an index. Nevertheless, since these costs can be expected to rise, the Department could consider adding a provision which would adjust these limitations with changes in the CPI-U as it has done in other sections of the rule.

9553.0036, item I.

85. Under this item, the costs of sponsoring non-resident activities such as athletic teams and beauty contests are not allowable. The disallowance in this part is similar to that contained in item L which makes an employee's or owner's membership fees in social, fraternal, sports, health or similar organizations nonallowable. Ms. Rowland suggested that these disallowances are inappropriate. She argued that employee membership in an athletic club, for example, should be allowable under a "cafeteria benefit system" where employees can choose between vacations, college tuition payments and memberships in health clubs. She suggested that any benefits made available to all staff members on an equitable basis should be an allowed cost. Although some facilities may have the cafeteria plans she mentioned, and make a variety of benefits available to their employees, the appropriate costs of ICF/MRs, which are supported by public funds, cannot be evaluated on the basis of what other employers who are not subject to state regulation can do. The Department has determined that public funds should be spent in a more restrictive manner, and for costs which must be incurred by efficiently operated facilities to care for mentally retarded persons. Its decision to impose tighter controls on employee benefits than that which would follow if they were treated like any other corporate entity is a necessary and reasonable one.

9553.0036, item J.

86. This item places limitations on the premiums for life insurance policies covering an owner or board member of a facility or an employee of a related organization. It generally provides that premiums on life insurance policies covering owners and board members are not an allowable cost unless the policy is similar to that provided to other employees. If a policy is required as a condition of a mortgage or loan, and the mortgagee or lending institution is listed as the beneficiary, premium costs are allowable. Ms. Rowland suggested that the premiums also be allowed if the facility or company is the beneficiary of the policy. She argued that the death or disability of an administrator has a more serious impact upon the operation of the facility than the death or disability of any other staff person and that the premiums on such policies should be allowed. She argued that the facility would then be able to hire an interim administrative staff and pay for other legal expenses resulting from the death of an owner or administrator. The Department did not directly address this suggestion, and while the rule in its present form is necessary and reasonable, it should consider the merits of her argument. The change suggested by her would not constitute a substantial change for purposes of Minn. Rule 1400.1100 (1985). However, if the Department were to amend this item, it is suggested that it include some language requiring that the proceeds of such policies be actually paid to the facility and used by it for specific purposes.

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9553.0036, items M and N.

87. These items govern the allowability of training program costs. Under item M, training programs for anyone except residents, facility employees, volunteers in the facility, or a resident's family or legal guardians are not allowable costs. Under item N, the cost of training programs that employees attend are not allowable if they are designed to meet the minimum educational requirements of a position or involve education leading to a degree or education which qualifies the employee for a new trade or profession. Clyde E. Johnson, Executive Director of Duluth Regional Care Center, Inc., argued that the cost of staff training leading to a degree is an appropriate use of money and should be allowed. That is not a persuasive argument. The Medical Assistance program is not designed to provide education to individuals who happen to be hired by a facility. It is designed to provide care to mentally retarded residents. Facility employees simply are not entitled to obtain a college education at state expense. Therefore, these items are necessary and reasonable.

9553.0036, Q.

88. This item provides that the costs of "personal needs items", such as personal clothing normally paid for by a resident, are not an allowable cost. Ms. Rowland argued that this provision is inconsistent with the provisions of Minn. Stat. §§ 626.557, subd. 2(e)(1) and 626.556, subd. 2(c). Under those statutes, the caretaker of a child or a vulnerable adult is guilty of criminal neglect if it fails to provide necessary food, clothing, shelter, health care, or supervision. She noted that ICF/MRs would have an obligation under these laws to pay for items such as clothing when a resident's personal needs allowance (\$40 monthly) is not adequate. She noted that facilities are frequently required to supplement the personal needs allowance of their residents to buy winter coats, boots or other clothing items. The provision of food, shelter, health care and supervision is not a personal needs item under the rule. Only clothing and other personal needs are covered by the exclusion. Under 42 C.F.R. § 435.832, a personal needs allowance for clothing and other personal needs must be provided to mentally retarded residents but the allowance cannot be applied to the cost of care. Since the costs of personal needs items is not allowable under federal regulations, this item is necessary and reasonable as proposed. Under Minn. Stat. § 256B.35, the Legislature established a personal needs allowance at not less than \$40 monthly. If that amount is insufficient to cover the personal need items of a resident, a facility must provide whatever personal needs are required by law to that resident but the costs cannot be included in the Medical Assistance rate. Whether or not the \$40 limitation established by the Legislature is appropriate cannot be determined in this proceeding. What items are included within a "personal needs allowance" is unclear. Presumably it would cover cosmetics, toiletry items, umbrellas, wallets and purses, but that is not clear. Therefore, it is suggested that the Department define those words or incorporate any current definition by reference.

9553.0036, item R.

89. Under this item, the costs incurred in providing other than ICF/MR services, such as the costs of apartments, day activity center or work activity center costs, regular travel costs to attend those centers and the

costs for semi-independent living services are not allowable costs. Regular travel costs to attend day activity centers, work activity centers and semi-independent living services programs are generally covered by those programs. Ms. Rowland noted, however, that there are many situations when transportation to such centers is necessarily provided by an ICF/MR. If residents miss their bus, if they have a doctor's appointment or if they are otherwise unable to obtain transportation to and from the center, it is provided by the facility. She argued that if ICF/MRs are required to provide transportation in such circumstances that cost should be allowable. The rule is designed to avoid paying for a resident's transportation costs twice: once to the center and once to the facility. As the Department noted, when a facility must provide transportation to a center because a resident misses the bus or has a doctor's appointment, the costs of such transportation are allowable and will not be considered to be regular travel costs. With that clarification, the rule is necessary and reasonable as proposed.

9553.0036, item Y.

90. Under this item, legal fees and related expenses incurred in unsuccessful challenges to the decisions of governmental agencies are not allowable costs. Mr. Furlong argued that this section should be deleted from the rule or clarified to explain what an "unsuccessful challenge" means. He noted that it is unclear whether a compromise would be considered a successful challenge. As a result, he stated that the rule would encourage litigation because the parties would desire an outcome that could clearly be defined as successful. A similar rule has been adopted for purposes of calculating the allowable costs of nursing homes (Minn. Rule 9549.0036C). The language in the nursing home rule was approved, in part, because the fees allowable had historically been resolved on a case-by-case basis in negotiations between the Department and the nursing homes. It was also noted that some flexibility would be needed in determining what would be successful in any given case because challenges to agency decisions usually involve varying degrees of success. The same principles are applicable here, and it is concluded that the rule proposed is necessary, reasonable and sufficiently specific.

However, further explanation of the Administrative Law Judge's understanding of this provision may be helpful in the event disputes do arise. Apparently the Department intends to make any legal fees incurred in connection with rulemaking proceedings nonallowable as it intended to do under the nursing home rule. Moreover, it is assumed that the only legal fees that may be considered are those incurred after a "challenge". A challenge is apparently a protest, appeal, or notice of intent to appeal taken from an initial agency decision. Expenses incurred in negotiations between a facility and an agency before an initial determination is made would not generally be allowable, but expenses incurred in negotiations subsequent to a challenge will be allowable if the facility is successful -- i.e., the agency alters its initial determination in a manner favorable to the facility. Success is not limited to favorable decisions after a hearing or a trial on the merits. The proposed rule is easy to apply when facility prevails on or wins an issue. The difficulty will arise when neither party clearly prevails on an issue. If a facility gets only partial relief, its fees will be only partially recoverable (allowable). The amount allowable will necessarily require a case-by-case consideration of the degree of success obtained. It is not feasible to be more specific.